

### REMARKS/ARGUMENTS

Claims 1-16 have been rejected. The specification has been amended to remove an embedded hyperlink. Claims 2, 4 and 9-16 have been amended to correct dependencies and typographical errors, and also to make the process of claim 9 directed to production of the product of claim 1. Claims 1 and 9 have also been amended to specify the herbs Support for these claim amendments may be found in the originally filed claims. Accordingly, no new matter has been introduced by way of these claim amendments.

Claim 7 has been rejected without prejudice to or disclaimer of the subject matter encompassed thereby. Applicants expressly reserve the right to file continuing applications or any other such appropriate action to preserve their rights to the subject matter encompassed by the cancelled claim.

Claims 1-6 and 8-16 are currently pending in the application. Reexamination and reconsideration of the claims are respectfully requested in view of the following remarks. The Examiner's comments in the Office Action dated February 29, 2008 are addressed below in the order set forth therein.

#### The Objections to the Specification and Claims Should Be Withdrawn

The Examiner has objected to the specification for containing embedded hyperlinks. The specification has been amended to remove "http://" from the listed web addresses. Accordingly, this objection has been obviated and Applicants request that it be withdrawn.

The Examiner has objected to claims 4, 9, and 15 for containing typographical errors. Claims 4, 9 and 15 have been amended to correct these typographical errors. Accordingly, this objection has been obviated and Applicants request that it be withdrawn.

#### The Rejection of the Claims Under 35 U.S.C. §112, First Paragraph, Should Be Withdrawn

Claims 1-16 have been rejected for lack of enablement under 35 U.S.C. §112, First Paragraph. The Examiner states that the specification is enabling for an antioxidant herbal drink

comprising *Sida* sps., *Boerhaavia diffusa*, *Vitis vinifera*, *Tinospora cordifolia* and *Withania somnifera*, along with jaggery, a fermenting agent and carbonated water, but is not enabling with respect to non-antioxidant properties or for a drink obtained from a mixture of two or more of the above-referenced herbs.

Claim 7, directed to various properties of the composition of claim 1, has been cancelled. Claim 1 has been amended such that it is directed to an herbal drink comprising *Sida* sps., *Boerhaavia diffusa*, *Vitis vinifera*, *Tinospora cordifolia* and *Withania somnifera*, along with jaggery, a fermenting agent and carbonated water. Claims 2-6 and 8-16 depend directly or indirectly from claim 1 and therefore incorporate the limitations of claim 1. Accordingly, this rejection has been obviated and Applicants request that it be withdrawn.

The Rejection of the Claims Under 35 U.S.C. §112, Second Paragraph, Should Be Withdrawn

Claim 2 has been rejected as being indefinite for lack of antecedent basis for the term “powdered mixture”. Claim 2 has been amended to remove this term. Accordingly, this objection has been obviated and Applicants request that it be withdrawn.

Claims 4, 9, and 15 have been rejected as being indefinite for inconsistencies in terminology regarding fermenting agents. Claim 9 has been amended to remove reference to *Saccharomyces* strain. Accordingly, this objection has been obviated and Applicants request that it be withdrawn.

Claim 10 was rejected for depending from itself. This typographical error has been corrected by amendment. Claim 10 was also objected to since use of the term “whole plant” does not further limit claim 9. The term “whole plant” has been removed from the claim. Accordingly, these objections have been obviated and Applicants request that they be withdrawn.

Claims 2, 5, and 11 were rejected for indefiniteness with respect to recited ratios within the “powdered mixture” and the fact that these ratios do not add to 100%. Claims 2, 5, and 11

have been amended to clarify that the percentage ratios are in reference to the herbal soft drink. Jaggery, the fermenting agent, and carbonated water make up the remaining portions of the herbal soft drink, as recited in claim 1. Accordingly, this objection has been obviated and Applicants request that it be withdrawn.

The Examiner states that there is some confusion regarding the interpretation of claim 9 in terms of whether the step of 9(c) involves boiling or simple cold infusion. As described above, Applicants submit that one of skill in the art would understand that step 9(c) involves decoction as described in the examples on pages 8-10 of the specification. Although limitations from the specification may not be read into the claims, the specification is always highly relevant to claim construction and “the construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction,” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005). In light of the description in the Examples, Applicants submit that the step of 9(c) is not indefinite and request that this rejection be withdrawn.

#### The Rejection of the Claims Under 35 U.S.C. §103(a) Should Be Withdrawn

Claims 1-16 were rejected under 35 U.S.C. §103(a) as being obvious in light of Brindavanam *et al.* (U.S. Pat. App. Pub. No. 2002/0025349) in view of the Himalayan Healthcare webpage and Unno (JP 58179476). This rejection is traversed for the reasons provided below.

Brindavanam *et al.* teach traditional methods for making arishtas, which involves taking a coarse powder of herbal material, mixing with water, heating and concentrating the extraction mixture, filtering the extract, adding jaggery and *Woodfordia fruticosa*, and fermenting for 40-45 days to generate alcohol as a preservative.

The Himalayan Healthcare webpage teaches that Geriforte is an herbal supplement with antioxidant action that contains approximately 35 separate component herbs along with Chyavanprash concentrate. Among these various herbal components are draksha (*Vitis vinifera*),

punarnava (*Boerhaavia diffusa*), guduchi (*Tinospora cordifolia*), and ashvagandha (*Withania somnifera*). Furthermore, Chyavanprash concentrate itself contains approximately 35 separate component herbs, one of which is a species of *Sida*.

Unno teach an alcoholic herbal beverage that contains carbonated water as a preservative.

The U.S. Supreme Court has held that the “teaching, suggestion, motivation to combine” (TSM) test promulgated by the Federal Circuit provides a “helpful insight” when assessing obviousness. *KSR Int’l Co. v. Teleflex, Inc.*, No. 04-1350, slip op. at 14 (U.S. Apr. 30, 2007). Moreover, the Court stated that “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *Id.* As recently stated by the Federal Circuit, “a flexible TSM test remains the primary guarantor against a non-statutory hindsight analysis.” *In re Ortho-McNeil Pharmaceutical, Inc., v. Mylan Laboratories, Inc.*, \_ F.3d\_, 2008 WL 834402, decided March 31, 2008, citing to *In re Translogic Tech., Inc.*, 504.3d 1249, 1257, 84 USPQ2d 1929 (Fed. Cir. 2007) (“[A]s the Supreme Court suggests, a flexible approach to the TSM test prevents hindsight and focuses on evidence before the time of invention.”)

As described above, Geriforte comprises various components that encompass up to 70 herbs. Applicants submit that none of the cited references provide any teaching or suggestion that would lead one of skill in the art to select the specifically claimed herbs from the myriad herbs encompassed by Geriforte and to combine these specific herbs in the proportions described within the claims to produce an herbal drink. Furthermore, nothing in the cited references teaches or suggests that the specific combination of herbs encompassed by the claims would produce the antioxidant action that is described within the experimental examples. Given the lack of a teaching or suggestion to combine and/or modify the cited references, one of skill in the art at the time of the invention would not have had sufficient guidance to have had a reasonable expectation of success in combining and/or modifying the teachings of the cited references to arrive at Applicants’ claimed invention. Accordingly, application of the TSM test in the instant case does not support a finding of obviousness and the rejection should be withdrawn.

Appl. No.: 10/539,427  
Amdt. Dated August 11, 2008  
Reply to Office Action of February 29, 2008

CONCLUSION

In view of the aforementioned amendments and remarks, Applicants respectfully submit that the objection to the specification and rejections of the claims under 35 U.S.C. §§103(a) and 112, First and Second Paragraphs, are overcome. Accordingly, Applicants submit that this application is now in condition for allowance. Early notice to this effect is solicited.

It is not believed that extensions of time or fees for net addition of claims are required. However, in the event that extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 C.F.R. §1.136(a), and any fee required therefore (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

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ELECTRONICALLY FILED USING THE EFS-WEB ELECTRONIC FILING SYSTEM OF THE UNITED STATES PATENT & TRADEMARK OFFICE ON August 12, 2008.